UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CAROLE L. BETZ, Appellant, v. GENERAL SERVICES ADMINISTRATION, Agency.	DOCKET NUMBER SF0752920512-I-1 DATE: OCT 30 1992

Terry Fox, American Federation of Government Employees, San Francisco, California, for the appellant.

Bonnie K. Zavadil, San Francisco, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency has petitioned for review of an initial decision that mitigated its removal of the appellant to a 45-day suspension. For the reasons set forth below, we GRANT the petition under 5 C.F.R. § 1201.115, REVERSE the initial decision, and SUSTAIN the agency's removal action.

BACKGROUND

The appellant acted as the agency's imprest fund cashier and was responsible for maintaining and safeguarding a $350

cashbox. On December 5, 1991, the agency conducted a surprise audit of the imprest fund. The audit revealed that $335.37 was missing from the imprest fund. The appellant admitted in an affidavit executed that day that she had been taking money from the imprest fund "since [the] middle of October" because she needed it to meet personal expenses. See Initial Appeal File (IAF), Tab 3, Subtab 4o. Effective February 21, 1992, the agency removed the appellant from her GS-7 Procurement Assistant position based on a charge that she took government funds without authorization and used them for other than official purposes. *Id.*, Subtabs 4a, 4b, 4g.

The appellant timely appealed the removal action, admitting that she took the money, but contending that the penalty of removal was unreasonably severe. *Id.*, Tab 1, Tab 3, Subtabs 4g at 2, 4k, 4n, 4o, and Tab 6; Hearing Tape 1, Side B (HT 1B). After affording the appellant a hearing, the administrative judge sustained the charge based on the appellant's affidavit and stipulation of facts. See Initial Decision (I.D.) at 2. He further found that a nexus existed between the appellant's misconduct and the efficiency of the service. *Id.*

As to the reasonableness of the penalty, the administrative judge found that the unique circumstances of this appeal warranted mitigation of the penalty because: (1) The appellant was a Federal employee for 19 years with no prior record of discipline; (2) she had a long history of financial difficulties, which began with her divorce in 1979

and included a bankruptcy in 1983; (3) her fiance died within the 2 years prior to her misconduct; (4) her son and daughter-in-law were arrested for drug related offenses for the second time in 1991; (5) her step-father was diagnosed with Alzheimer's disease and was forced to move in with her;[1] (6) her daughter was arrested and incarcerated in Mexico for drug possession in 1990 and subsequently moved in with her; (7) she has been diagnosed by a psychiatrist with depression aggravated by her family problems, health problems, financial difficulties, and job stress, and has been in therapy and on medication; (8) she had a long daily commute to work and needed two new tires and emergency repairs on her automobile, which she paid for by issuing a check that was returned for insufficient funds, and needed the money from the imprest fund to make the check good because she was denied a loan by her credit union; and (9) she made full restitution of the missing funds soon after the audit revealed the shortfall. I.D. at 3-5.

The administrative judge found that the appellant's misconduct was serious and affected her reputation for

[1] The administrative judge misstated this piece of evidence. The appellant testified that her step-father had Alzheimer's disease and she cared for him for 4 months before he was institutionalized. HT 1A. She never stated that he lived with her. She did, however, state that her father now lives with her and that she cares for him. *Id.* She further testified that her mother is terminally ill, a fact which the administrative judge did not mention. *Id.* We find that any error in this regard was not prejudicial to the appellant's substantive rights, and thus provides no basis for reversal of the initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

honesty, but noted that the agency did not charge her with theft or show that she could not encumber her position if she were relieved of her responsibility for the imprest fund. *See* I.D. at 6. He also found that her "misconduct occurred at a time of acute financial and emotional stress, and against a background of an unusual coincidence of personal crises," and that she provided medical documentation for her depression. *Id.* He further found that she expressed remorse and accepted responsibility for her actions, and was thus a good candidate for rehabilitation. *Id.* In addition, he determined that a lengthy suspension would adequately deter similar misconduct, and that her long years of service with no prior discipline warranted mitigation. *Id.* at 6-7. He also noted that her most recent performance evaluation rated her as "marginally successful," but found reason to believe that her performance problems were due to her personal difficulties. *Id.* at 7. He thus mitigated the removal to a 45-day suspension. *Id.*

The agency has filed a timely petition for review in which it asserts that the administrative judge improperly substituted his judgment for that of the deciding official in mitigating the penalty. *See* Petition for Review File (PFRF), Tab 1. The appellant has not responded to the petition.

ANALYSIS

The Board will review an agency-imposed penalty only to determine if the agency conscientiously considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *See, e.g, Parker v.*

Department of the Navy, 50 M.S.P.R. 343, 353 (1991); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In making this determination, we must give due weight to the agency's primary discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management responsibility, but to assure that managerial judgment has been properly exercised. *Parker*, 50 M.S.P.R. at 353; *Douglas*, 5 M.S.P.R. at 306.

We find that the administrative judge improperly substituted his judgment for that of the deciding official in determining to mitigate the penalty. The deciding official stated in the removal decision notice that he considered the appellant's statement that her misconduct was "a one-time situation caused by unusual financial hardship and that [she was] extremely sorry and embarrassed." IAF, Tab 3, Subtab 4b at 1. He further noted that she was on medication to control her depression, her long commute, the tension between the appellant and her supervisor, and the appellant's explanation that the government was not inconvenienced by her misconduct because she had admitted to appropriating the funds and had made restitution. *Id.* In fact, we note that the appellant presented many of the same explanations and mitigating circumstances in her oral and written replies to the deciding official that she testified to at the hearing. *See* IAF, Tab 3, Subtabs 4d, 4e. However, the deciding official found that he could not give great weight to the fact that she

admitted taking the money and had made restitution because, if she had not returned the funds, the agency would have withheld them from her pay until restitution had been made in full. *See id.*, Subtab 4b at 1.

The deciding official further found that a letter from the appellant's physician dated September 25, 1991, stated that her mental condition was "normal," and that her medication was alleviating her symptoms and were not expected to interfere with her work. *Id.*; *see also* IAF, Tab 3, Subtab 4p. Additionally, the deciding official stated that the appellant's reliance on her long commute, job stress, and difficulties with her supervisor as defenses to the penalty determinations "suggest[] that [her] ability or willingness to act honestly is affected by pressures which are part of everyday life for many working people, and which would continue if [she] remained in [her] position." *Id.*, Subtab 4b at 2. He also found that her insistence that the government was not harmed by her misconduct showed that she failed to appreciate the gravity of the offense "and the fact that [her] trustworthiness is the central issue." *Id.* Finally, he stated that he thought she was sincere in expressing her remorse, but that she attempted to place the blame for her actions on other people or outside circumstances, and he was not persuaded that she accepted responsibility for her misconduct or that she had "adequate insight into [her] decision to take the money from the fund." *Id.* After considering her 19 years of Federal service without prior

discipline, her current "marginally successful" performance rating, and the fact that a lesser penalty would not deter similar misconduct, he determined that removal was the appropriate penalty. *Id.* We agree.

The administrative judge treated the appellant's unusual combination of personal and financial difficulties as an isolated event despite his acknowledgment that she testified that "she had a long history of financial difficulties," and that her son and daughter-in-law had been arrested for drug offenses at least once before. I.D. at 3; HT 1A. He apparently gave great weight to the appellant's statement that the incident was a "one-time thing" and would not happen again. HT 1B; *see* I.D. at 6.

However, the administrative judge completely disregarded the appellant's 1990 conviction for shoplifting. On cross-examination, when asked if anything similar to the present charge had ever happened to her before, the appellant stated "no." HT 1B. When pressed, though, she admitted that she had been convicted of shoplifting a bottle of Tylenol in 1990, but that she did not consider her conviction for shoplifting to be similar to taking government funds without authorization. *Id.* Further, the agency introduced evidence that she actually shoplifted two packs of cigarettes, one box of Jet-Dry, and one package of lemonade mix, rather than a bottle of Tylenol. *See* IAF, Tab 3, Subtab 4h; HT 1B. A conviction for shoplifting certainly calls into question the appellant's reputation for honesty and integrity and, contrary to the

appellant's protestations, we believe that shoplifting and taking government funds without authorization and using them for personal gain are similar offenses in many respects. *See Underwood v. Department of Defense*, 53 M.S.P.R. 355, 360 (1992). In addition, her conviction for shoplifting is evidence that the appellant has committed similar offenses before the misconduct for which she was removed, and that it was therefore not a "one-time thing." *Id.*; *see* IAF, Tab 3, Subtab 4h.

The administrative judge also failed to address the numerous inconsistencies in the appellant's hearing testimony and in her prior statements to agency officials and investigators. This is significant because the appellant's misconduct involved dishonesty, and any inconsistencies reflect on her potential for rehabilitation. For example, she characterized her divorce and bankruptcy as occurring within the last 2 years. *See* IAF, Tab 6 at 2. However, she testified at the hearing that she was divorced in 1986, but, when confronted with contrary evidence, then admitted that she was divorced in 1979. HT 1A, 1B; IAF, Tab 10, Agency's Exhibit 2. She claimed that she received no training in contract administration whatsoever, HT 1A, and that she only received 5 days of total training during her 2 1/2 years of service with her supervisor. *See* IAF, Tab 6 at 2. On cross-examination, when shown her training records indicating that she had received 168 hours of training since June 1989, including 40 hours in contract administration, she admitted

that the agency's records were accurate. HT 1A; *see* IAF, Tab 3, Subtab 4i, and Tab 10, Agency's Exhibit 1. She stated at various times that her daughter moved to San Diego in October 1991, *see* IAF, Tab 3, Subtab 4n, and in June or July 1991. HT 1B. Furthermore, the appellant failed to produce any evidence to corroborate or substantiate her personal and financial difficulties and, when the agency was able to obtain documentation for some of those difficulties, it discovered that she misrepresented the timing or nature of her divorce, bankruptcy, shoplifting conviction, and training record.

More important, the agency's investigator of the appellant's misconduct reported at the time of the audit that the appellant admitted that she took money from the imprest fund "approximately 5 times," in amounts varying between $5 and $80, and that she replaced the money when she was paid. *See* IAF, Tab 3, Subtab 4n at 1-2. She also stated in her December 5, 1991 affidavit that she had been taking money from the imprest fund "since [the] middle of October." IAF, Tab 3, Subtab 4o at 1. However, she claimed at the hearing that the investigator's report was false and that she never told him that she had taken money from the fund five times. HT 1B. This conflicting testimony indicates that the appellant may have made a practice of "borrowing" cash from the imprest fund for personal use, further evidence that this was not a "one-time thing."

The administrative judge also found that the agency failed to show that responsibility for the imprest fund was an

official duty of the position of Procurement Assistant, or that the appellant could not encumber her position while being relieved of that duty. *See* I.D. at 6. However, the administrative judge found it undisputed that the appellant was responsible for the imprest fund; it was in her direct custody and control. *Id.* at 1-2. Her misconduct was therefore very serious, going to the heart of her duties and responsibilities, *id.* at 2, and was committed for her own personal gain. *Id.* at 4. Furthermore, as the agency argues, relieving the appellant of her responsibility for the imprest fund amounts to an accommodation of the appellant's dishonesty. *See* PFRF, Tab 1 at 9-10.

The administrative judge also afforded too much weight to the fact that the appellant has been in treatment for her depression. There is little connection between her depression and her misconduct in light of her physician's September 25, 1991 statement to the agency that her "mental status examination [was] normal," her "prognosis [was] excellent," and that she had "major depression. single episode."[2] IAF, Tab 3, Subtab 4p (emphasis supplied); *see also* IAF Tab 9, Appellant's Exhibit 1.

The appellant was repeatedly unable to explain how her difficulties affected her judgment and caused her to take money from the imprest fund. When asked, she merely stated, "it was poor judgment." She claimed that she shoplifted

[2] *See* Diagnostic and Statistical Manual of Mental Disorders §§ 296.2x-296.3x (3d ed. rev. 1987).

because she was then experiencing the same array of personal problems that she faced in December 1991, when she took money from the imprest fund, even though she admitted that her conviction for shoplifting took place over 2 years prior to the hearing. She also said that her conviction reflected her "very poor judgment." HT 1B. She admitted that her false claim that she had not received any training and her poor relationship with her supervisor were not relevant to her misconduct, but she persisted in pursuing these complaints at the hearing. HT 1A. The deciding official found, in making his penalty determination, that the appellant did not accept responsibility for her actions, but instead tried to blame them on other people and outside events, and that she did not have "adequate insight into [her] decision to take the money from the fund." IAF, Tab 3, Subtab 4b at 2. Although she stated that her misconduct would never happen again, she presented no evidence or assurance below that her problems have been resolved.

Further evidencing the appellant's poor potential for rehabilitation, she attempted to borrow money from her supervisor immediately after she learned about the impending audit to cover a portion of the shortfall and only admitted that she had taken the money after her supervisor refused to loan her the money. *See* IAF, Tab 3, Subtab 4g. In addition, while the appellant had 19 years of Federal service, only 3-1/2 of those years were with the agency. *See* IAF, Tab 1 at 1; *see also* IAF, Tab 3, Subtab 4b at 2-3; I.D. at 7. And,

as noted above, the appellant was a "marginally successful" employee, as evidenced by her 1990 and 1991 performance ratings. *See* IAF, Tab 3, Subtabs 4c, 4r.

The appellant also failed to appreciate the seriousness of her misconduct. She testified that her conduct was "bad, but it wasn't that bad," that she did not know why she was being "hung," and that removal was "like the electric chair." HT 1B; *see Underwood*, 53 M.S.P.R. at 360. She proposed a mere 5-day suspension as an appropriate penalty. *See* IAF, Tab 3, Subtab 4e. We find that the amount taken from the fund, $335.37 was not de minimis, however. *See Gilmore v. Department of the Army*, 7 M.S.P.R. 253, 256 (1981) (the value of the goods stolen by the employee, approximately $100, was "not inconsiderable").

Mitigation of a removal penalty has been found to be inappropriate, even when the item taken is of de minimis value, if the item was within the custody and control of the employee, as here. *See, e.g., DeWitt v. Department of the Navy*, 747 F.2d 1442, 1445 (Fed. Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); *Underwood*, 53 M.S.P.R. at 359. Moreover, the agency in this appeal has a compelling interest in deterring such misconduct. Further, there was no basis for the administrative judge to conclude that the appellant was a good candidate for rehabilitation in light of her lack of insight into her motives for taking the funds, her numerous unresolved inconsistent statements, her mischaracterization of the evidence, and her prior conviction for shoplifting. *See*

Underwood, 53 M.S.P.R. at 360. Although the appellant has recently suffered through calamitous personal crises, it is the efficiency of the service, not whether the appellant deserves sympathy, that is the ultimate criterion for determining whether a particular penalty may be sustained. *See Goode v. Defense Logistics Agency*, 31 M.S.P.R. 446, 449 (1986); *Douglas*, 5 M.S.P.R. at 303.

Accordingly, we conclude that the agency considered all of the relevant factors and exercised its management discretion within tolerable limits of reasonableness, and we see no basis on which to disturb the agency's choice of the penalty of removal. *See Underwood*, 53 M.S.P.R. at 358-61; *Parker*, 50 M.S.P.R. at 353; *Douglas*, 5 M.S.P.R. at 306.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.